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Supreme Court, U.S.
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No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

SUPPLEMENT TO REPLY BRIEF FOR PETITIONER

Charles E. Haden*
Suite B
2440 West Queen Street
Hampton, VA 23666
(757) 825-0022

* Counsel of Record

Robert E. Lee
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
Suite 301
2421 Ivy Road
Charlottesville, VA 22903
(804) 817-2970

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The issue in the supplement to Atkins' petition for a writ of certiorari was raised below.

Atkins squarely presented the federal constitutional issue in his opening brief to the Supreme Court of Virginia:

> While the 8th Amendment's prohibition against cruel and unusual punishment does not categorically prohibit the imposition of the death penalty on Mr. Atkins because he is mentally retarded, *Penry v. Lynaugh*, 492 U.S. 302(1989), whether or not the death penalty is excessive is to be judged at any given time by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). . . . [T]oday's society's standards have evolved to the point that imposition of the death penalty on an individual with a 59 IQ who is not eligible for parole is excessive.

Appendix to Petition for Writ of Certiorari ("App.") at 131 (emphasis added).

Virginia, in response, addressed the merits of the precise Eighth Amendment issue in its brief below:

> To the extent that Atkins argues that societal standards of decency have evolved since *Penry* and now prohibit his execution, Atkins has offered absolutely no support for his novel proposition. At the time of the *Penry* decision, *see* 492 U.S. at 340, and today, there simply is no national consensus against execution of the mentally retarded.

App. at 151 n.2 (emphases added).[1]

The Supreme Court of Virginia discussed the merits of this issue in its opinion below:

> Atkins . . . assert[s] that he is mentally retarded and thus cannot be sentenced to death. Quoting from *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Commonwealth . . . contends that execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency. . . . The Supreme Court of the United States has ruled that imposition of the death penalty on a mentally retarded defendant with the approximate reasoning capacity of a seven-year-old child does not violate the Eighth Amendment prohibition against cruel and unusual punishment solely because of the defendant's mental retardation. *Penry*, 492 U.S. at 336.

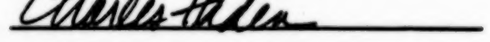
Atkins v. Commonwealth, 534 S.E.2d 312, 318-19 (Va. 2000) ("*Atkins II*"), App. at 25-27 (emphases added).

[1]Virginia argued below, in the alternative, that Atkins' Eighth Amendment claim was defaulted. The Virginia Supreme Court addressed the federal constitutional issue only on the merits. Under the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032, 1042 and n.7 (1983), this Court may reach the federal question on review because the state court's opinion does not contain a plain statement that its decision rested on adequate and independent state grounds.

CONCLUSION

The issue is ripe. For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court. I further certify that on April 10, 2001, I caused the foregoing Supplement to Reply Brief for Petitioner to be served by first-class mail, postage prepaid, on Pamela A. Rumpz, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

Rob Lee

Charles E. Haden*
Suite B
2440 West Queen Street
Hampton, VA 23666
(757) 825-0022

* Counsel of Record

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